UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LISA FEATHERSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-41-P-H***
	)	
DAVRIC MAINE CORPORATION, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON MOTION OF DEFENDANT RICCI FOR JUDGMENT ON THE PLEADINGS, TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR FOR SUMMARY JUDGMENT[1]

Joseph Ricci, one of two defendants in this action, has moved to dismiss the claims asserted against him in the second amended complaint and in the alternative for judgment on the pleadings or for summary judgment on all such claims. The action arises out of alleged instances of sexual harassment and defamation by Ricci occurring, with one exception, while the plaintiff was employed by the corporate defendant, of which Ricci is a supervisory employee. I recommend that the court grant the motion in part and deny it in part.

[1] Defendant Ricci has requested oral argument on his motion. Docket No. 22. Because I am satisfied that the written submissions of the parties are sufficient to permit the court to resolve the issues raised therein, the request for oral argument is denied.

I. Applicable Legal Standards

Ricci has moved to dismiss the plaintiff's claims against him pursuant to Fed. R. Civ. P. 12(b)(1) and (6). When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff has the burden of demonstrating that the court has jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). For the purposes of a motion to dismiss under Rule 12(b)(1) only, the moving party may use affidavits and other matter to support the motion. The plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990); *see Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

Ricci has also moved for summary judgment. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a

contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

Because the parties have submitted material outside the pleadings which I will consider, Ricci's motion for judgment on the pleadings will be treated as a motion for summary judgment. Fed. R. Civ. P. 12(c); *Whiting v. Maiolini*, 921 F.2d 5, 6 (1st Cir. 1990).

II. Factual and Procedural Background

The plaintiff's initial complaint, filed February 13, 1998, alleges that she was sexually harassed on several occasions by defendant Ricci. Complaint (Docket No. 1) ¶ 13. It alleges that

she was employed by the corporate defendant from the summer of 1996 until she was laid off in October 1996 and again from January 1997 until she resigned on May 1, 1997. *Id.* ¶¶ 12, 16. The complaint raises claims of violation of Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. § 2000(e), and violation of the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*, against both defendants, *id.* Counts I-II, as well as claims of intentional and negligent infliction of emotional distress, assault, battery, and defamation against defendant Ricci, *id.* Counts III-VII.

The plaintiff amended her complaint on March 23, 1998. Docket No. 2. Defendant Ricci filed the motion now before the court on May 13, 1998. Docket No. 7. The plaintiff filed a motion to amend the amended complaint on May 18, 1998 (Docket No. 10) which was granted over the defendants' objection. Docket No. 20. The amendment allowed by the court changed the name of the corporate defendant as it appears in the plaintiff's pleadings and added two paragraphs of factual allegations.

The second amended complaint alleges, in relevant part, details of an alleged incident of sexual harassment of the plaintiff by Ricci that occurred on April 29, 1997 at the plaintiff's place of employment, that the plaintiff was constructively discharged, that Ricci made a specific false statement about the plaintiff in April 1997 in the presence of others, and that the defendants acted with actual malice toward the plaintiff. Second Amended Complaint (Docket No. 21) ¶¶ 14, 16, 17, 21.

III. Discussion

Ricci's motion contends that the plaintiff's federal-law claim and the claim under the Maine Human Rights Act (Counts I and II) may not be asserted against him individually; that all of the

state-law claims made against him by the plaintiff are barred by the exclusivity provision of the Maine Workers' Compensation Act, 39-A M.R.S.A. § 104; that the allegations concerning defamation are insufficient to state a claim upon which relief may be granted; that the plaintiff's claims against the corporate defendant are fundamentally inconsistent with her claims against Ricci; and that this court should not exercise supplemental jurisdiction over any state-law claims against Ricci that may not otherwise be subject to dismissal or summary judgment.[2]

The plaintiff has conceded that Ricci is entitled to summary judgment on Counts I and II of her complaint, as amended. Plaintiff's Memorandum of Law in Support of Her Objection to Defendants' [sic] Motion for Judgment on the Pleadings, etc. ("Plaintiff's Mem."), attached to Plaintiff's Objection to Defendant Ricci's Motion for Judgment on the Pleading, etc. (Docket No. 16), at 3. Judgment should be entered accordingly.

However, the plaintiff contends that her state-law claims against Ricci are not subject to the exclusivity provision of the Maine Workers' Compensation Act because (i) Ricci was not her employer, (ii) one instance of physical and verbal sexual harassment by him occurred while she was not employed by the corporate defendant, and (iii) none of the harassing actions "involved work or any work-related issue." *Id*. at 4-5. She also asserts that her state-law claims against Ricci involve

[2] The parties' submissions in connection with the motion for summary judgment in purported compliance with this court's Local Rule 56 may most charitably be described as minimal. Ricci's Statement of Undisputed Facts, Docket No. 8, contains two sentences. The plaintiff's Statement of Genuine Issues of Material Fact in Dispute, Docket No. 18, utterly fails to comply with the local rule. *See Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995). The plaintiff has appropriately disputed one of Ricci's stated facts, Plaintiff's Response to Defendants' [sic] Statement of Undisputed Facts (Docket No. 19). To the extent that the court reaches the request for summary judgment, it must of course nonetheless consider the merits of the motion. *See Redman v. FDIC*, 794 F. Supp. 20, 21-22 (D. Me. 1992) (court must consider merits of motion for summary judgment even in absence of objection by non-moving party).

the same case or controversy as her federal-law claim against the corporate defendant and that the court should therefore exercise its supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over those claims. *Id.* at 6.

Under Maine law the immunity of supervisors and co-employees under the Workers' Compensation Act ("the Act") is co-extensive with that of the employer. *McKellar v. Clark Equip. Co.*, 472 A.2d 411, 415 (Me. 1984.) Therefore, if any of the plaintiff's state-law claims against Ricci would be barred under the exclusivity provision of the Act if brought against the corporate defendant, it is also barred against him. That section of the Act provides, in relevant part:

> An employer who has secured the payment of compensation in conformity with sections 401 to 407 is exempt from civil actions, either at common law or under [certain state statutes] involving personal injuries sustained by an employee arising out of and in the course of employment, or for death resulting from those injuries. . . . These exemptions from liability apply to all employees, supervisors, officers and directors of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries.

39-A M.R.S.A. § 104.

Injuries arising from assault, including sexual assault and sexual harassment, are compensable under the Act and thus barred as separate tort claims. *Knox v. Combined Ins. Co. of Am.*, 542 A.2d 363, 365-66 (Me. 1988). Emotional distress, whether intentionally or negligently inflicted, may also be compensable under the Act. *Bond Builders, Inc. v. Commercial Union Ins. Co.*, 670 A.2d 1388, 1389, 1390 (Me. 1996). Defamation claims, under certain conditions, are also compensable under the Act. *Caldwell v. Federal Express Corp.*, 908 F. Supp. 29, 34 (D. Me. 1995). For each of the state-law claims against Ricci, therefore, the question becomes whether the alleged torts arose out of and in the course of the plaintiff's employment by the corporate defendant.

"An injury arises out of employment when, in some proximate way, it has its origin, its source, or its cause in the employment." *Li v. C. N. Brown Co.*, 645 A.2d 606, 609 n.2 (Me. 1994). An injury occurs "in the course of" employment when it "occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incidental thereto." *Hebert v. International Paper Co.*, 638 A.2d 1161, 1162 (Me. 1994), quoting *Wing v. Cornwall Indus.*, 418 A.2d 177, 179 (Me. 1980). Here, the only evidence offered by the plaintiff that any of the events upon which she bases her claims took place other than in the course of her employment is a reference to a Christmas party in 1996, while she was not an employee of the corporate defendant, when Ricci made a remark that she believes was a reference to sexual intercourse. Affidavit of Lisa Featherson ("Plaintiff's Aff.") (Docket No. 17) ¶ 5. Accordingly, I will limit my further review of the plaintiff's allegations to the "arising out of employment" prong of the statutory test.

The plaintiff relies on the conclusory statement in her affidavit that "[n]one of the sexually harassing comments or touching involved work or were related to work issues in any way." Plaintiff's Aff. ¶ 9. That statement is not sufficient, not does it correctly reflect the statutory test. Early explications by the Maine Law Court of the "arising out of employment" aspect of the test took the following form: "To arise out of the employment the injury must have been due to a risk of the employment." *Wolfe v. Shorey*, 290 A.2d 892, 893 (Me. 1972). In *Ramsdell v. Naples*, 393 A.2d 1352 (Me. 1978), a case upon which both parties rely, the Law Court defined the test "to require that there be some causal connection between the conditions under which the employé worked and the injury which he received," *id*. at 1354 (internal quotation marks and citation omitted). "The test in such cases is whether the employee was injured as a result of a hazard of his employment." *Id.*

It is difficult to conceive of an emotional injury, or an assault or battery, that occurs as a result of a hazard or risk of employment. However, the Law Court has further refined the test. Injuries that arise out of work-related disagreements, assaults where the risk of assault is increased because of the nature or setting of the work, and injuries from an act of an employee when the employer knew or should have known that the employee had frequently engaged in such acts in the past are held to arise out of the employment. *Id.* at 1354-55. Here, there are no allegations that fit the first two categories. However, the second amended complaint does allege that Ricci sexually harassed the plaintiff on "several occasions," Second Amended Complaint ¶ 13, and that he sexually harassed her "making similar comments, several times in the past," *id.* ¶ 15. Ricci admits that he was "a supervisor of the plaintiff's employer," Defendant Joseph Ricci's Answer to Second Amended Complaint (Docket No. 25) ¶ 4, thereby bringing the allegations within the third-listed category, as he must have known about his own acts in the past. The plaintiff offers nothing in the summary judgment record to refute this conclusion. In fact, she alleges that Ricci is an owner and/or a management employee of her employer. Second Amended Complaint ¶ 4. Based on the summary judgment record, I conclude that the plaintiff's claims against Ricci, with the exception of those arising from the 1996 Christmas party, and those concerning defamation, are based on conduct that occurred while and because the plaintiff was at work and therefore fall within the scope of the Act. *Caldwell*, 908 F. Supp. at 33-34.

The defamation claim requires separate scrutiny. Under *Caldwell*, "libel and slander claims that pertain to job-related information will not support a recovery" due to the exclusivity provision of the Act. *Id.* at 34. The allegedly defamatory statement at issue in this case was assertedly made by Ricci to the plaintiff and "others present": "I know her. She lived with me for two years. She left

me a tuna casserole and a note on the refrigerator saying that I was no good in bed. She broke my heart." Plaintiff's Aff. ¶ 7; Second Amended Complaint ¶ 17. This statement appears to concern issues and incidents outside work-related issues and therefore certainly states a claim upon which relief may be granted. *Caldwell*, 908 F. Supp. at 34. Ricci offers nothing in the summary judgment record concerning this statement; he relies only on his argument that this claim, like the other state-law claims against him, are barred by the Act. *See* Memorandum Decision on Plaintiff's Motion to Amend Complaint (Docket No. 20) at 3. I have already rejected that argument. Based on the summary judgment record, Ricci is not entitled to summary judgment on this claim.

Ricci also argues that this court should not exercise its supplemental jurisdiction over claims arising from the alleged Christmas party incident because those claims are not so related to the federal-law claim against the corporate defendant that they form part of the same case or controversy, within the meaning of 28 U.S.C. § 1367(a), the statute establishing the supplemental jurisdiction of the federal courts. Contrary to Ricci's characterization of this conduct, it is not "pre-employment" harassment. The plaintiff was employed by the corporate defendant until two months before the party and re-employed by the corporate defendant less than one month thereafter. At best, harassment that occurred at the party was "intra-employment" harassment, and Ricci has not provided this court with sufficient factual material in the summary judgment record to enable me to make a recommendation based on a conclusion concerning the degree of relation between this harassment and the alleged harassment that occurred while the plaintiff was actually employed by the corporate defendant.

The record currently before the court demonstrates sufficient connection between the alleged defamatory statement by Ricci and the acts, all of them performed by Ricci, alleged to form the basis

of the federal-law claim against the corporate defendant to justify exercise of supplemental jurisdiction under section 1367(a). Under the circumstances, the court may also exercise supplemental jurisdiction over any claims against Ricci arising out of his actions at the December 1996 Christmas party, but only such actions.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of defendant Ricci for summary judgment be **GRANTED** as to Counts I and II of the second amended complaint, and otherwise **DENIED**; and that his motion to dismiss be **GRANTED** as to Counts III-VI as to any claims arising out of events other than those that took place at a Christmas party in December 1996, and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of June, 1998.

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David M. Cohen
United States Magistrate Judge